INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	11
Appendix A	13
Appendix B	23
Appendix C	25

CITATIONS

Cases:

Bauman v. *Ross*, 167 U.S. 548 — 6, 8

Bruton v. *United States*, 391 U.S. 123 — 6, 8

Jackson v. *Denno*, 378 U.S. 368 — 8

John L. Roper Lumber Co. v. *United States*, 150 F. 2d 329 — 7

Shoemaker v. *United States*, 147 U.S. 282 — 10

Smither v. *United States*, 117 C. Cls. 574, 91 F. Supp. 582, certiorari denied, 340 U.S. 931 — 10

Sykes v. *United States*, 392 F. 2d 735 — 6

United States v. *Commodities Trading Corp.*, 339 U.S. 121 — 8

United States v. *Crance*, 341 F. 2d 161, certiorari denied, 382 U.S. 815 — 9

United States v. *First Pyramid Life Insurance Co.*, 382 F. 2d 804 — 9

United States v. *Miller*, 317 U.S. 369 — 4, 5, 6, 7, 9, 10

347-709—69——2

United States v. *New River Collieries Co.*, 262 U.S. 341 8
United States v. *91.69 Acres in Oconee County*, 334 F. 2d 229 8
United States v. *172.80 Acres of Land, etc.*, 350 F. 2d 957 9
Wardy v. *United States*, 402 F. 2d 762 ..... 5, 6, 7, 8

Statutes and Rules:

Act of September 28, 1968, Pub. L. 90–536, 82 Stat. 885 9
28 U.S.C. 1358 3
F.R. Civ. P.:
Rule 71A 9
Rule 71A(h) 2, 3, 5, 6, 7, 8, 9

Miscellaneous:

5 Moore, *Federal Practice* (2d ed. 1968) ¶38.32[1] 7
7 Moore, *Federal Practice* (2d ed. 1968) ¶71A.90[3] 7
1 Nichols, *Eminent Domain* (3d ed.) 7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals as amended upon denial of rehearing (App. A, *infra*) is reported at 404 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968 (App. C, *infra*). A petition for rehearing was filed within the time as extended by the court, and was denied on January 24, 1969 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in condemnation proceedings under Fed. R. Civ. P. 71A(h) it is for the court or for the jury or commission to decide whether certain lands were within the scope of a federal project (in which event the government would not be required to pay any enhancement to the value of the condemned tract brought about by the existence of that project).

2. Whether this scope-of-the-project rule requires a showing that it was decided in the early stages of the project that the particular tract in question would probably be taken, or that some tracts so situated would probably be taken, or a showing only that the land was within the general area influenced by the project and was taken for it.

RULE INVOLVED

Rule 71A(h) of the Federal Rules of Civil Procedure provides, in relevant part:

> [I]f there is no * * * specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that * * * the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

This condemnation proceeding was instituted in United States District Court for the Western District of Kentucky to obtain more than 250 acres of respondents' land in conjunction with construction of the

Nolin Reservoir project. Most of the land condemned was taken because it would be inundated by the reservoir; about 78 acres were taken for use in the construction of recreation facilities on the shore of the reservoir, as part of the overall project. As a matter of policy, recreational areas have been acquired in conjunction with federal reservoir projects since 1944. In the present case, it appeared that Congress had appropriated planning funds for the project in 1956, and construction funds in October, 1958. In July of 1958, the Chief of Engineers (Department of the Army) had approved a general design memorandum contemplating the construction of appropriate recreational areas, but not specifying where they would be. The project was begun in January 1959; although not mentioned in a design memorandum submitted in June of that year, the 78 acres were designated for taking in the memorandum as approved in October, 1959. Respondents purchased the land in question in that month and in January, 1960. The notice of taking of this and other lands involved in the project was filed April 16, 1962. The district court's jurisdiction was invoked under 28 U.S.C. 1358, and a jury trial commenced, Fed. R. Civ. P. 71A(h), to determine the issue of just compensation.

At trial, the respondents contended that the addition of the 78 acres to the design memorandum was an afterthought, and, correspondingly, that the land ought to be valued for the recreational potential it would enjoy on account of the reservoir, rather than for the agricultural uses the land would have continued to enjoy had the reservoir not been built. On

the basis of a pre-trial hearing, the district court at first ruled that the valuation witnesses could not testify regarding any element of enhancement due to the project, since the property was within the scope of the project, *United States* v. *Miller*, 317 U.S. 369. After the jury was sworn, the court reversed itself and decided that the scope-of-the-project question should be submitted to the jury by special interrogatory, and that enhancement evidence therefore could be received. Opinions of value both including and excluding enhancement from the project were presented by the landowners. The jury found that the land was probably within the scope of the project from the time the government was committed to it and returned a verdict of $20,000.

On respondents' appeal, the court of appeals held that the scope-of-the-project issue was for the jury. It reversed upon finding that the lower court had improperly commented on evidence not heard by the jury relating to this question. In response to the government's petition for rehearing, which was denied, the court amended its opinion by inserting the following footnote (App. A, *infra*, at p. 17; App. B, *infra*):

> After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, — F. 2d — (5th Cir. 1968), was called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

REASONS FOR GRANTING THE WRIT

1. The opinion below is in acknowledged conflict with the Fifth Circuit's recent opinion in *Wardy* v. *United States*, 402 F. 2d 762, regarding the proper function of the jury or commission under Fed. R. Civ. P. 71A(h). In *Wardy*, the landowners sought to put before the jury testimony concerning the price they paid for two tracts condemned in connection with a federal project. They had purchased the tracts after the project's existence had become known. Under this Court's decision in *United States* v. *Miller*, 317 U.S. 369, 377, their right to receive compensation for any enhancement to the value of their land brought about by the project depended upon

> whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

The trial judge in *Wardy* ruled that the lands in question were within the scope of the project, thus defined, and refused to permit either that issue or the corresponding valuation evidence to be put before the jury. On appeal, the landowners contended that the scope-of-the-project question was a jury issue, and that the trial

judge had interfered with the jury's function by reserving it for himself. The Fifth Circuit affirmed, holding:

> Under rule 71A(h) the jury's function is limited to determining "just compensation." It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] *Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of "just compensation."* [Emphasis supplied.]

In the present case, the landowners wanted the jury to hear testimony concerning the value their land would have for recreational uses—value created entirely by the federal reservoir project—and so claimed that the taking for that use had not been within the scope of the project in the *Miller* sense. The trial court concluded that this was a jury issue, and the court of appeals agreed. Thus, Sixth Circuit juries, unlike Fifth Circuit juries, will now receive evidence of enhancement values whenever landowners claim that the land taken was not within the scope of the project under *Miller*—even though the claim is unfounded and therefore these values should be disregarded.

We believe that the Fifth Circuit's interpretation of Rule 71A(h), treating the scope-of-the-project question as for the judge, is the correct one. As Rule 71A(h) itself recognizes by its provision for trial to commissioners, there is no constitutional right to jury trial in eminent domain proceedings. See, also, *Bauman* v. *Ross*, 167 U.S. 548, 593; *Sykes* v. *United*

States, 392 F. 2d 735 (C.A. 8); 5 Moore, *Federal Practice* ¶38.32[1]. It follows that the scope of any jury trial permitted by the Rules may be limited; and, as the Fifth Circuit noted, Rule 71A(h) plainly does limit the scope of jury consideration to "the issue of just compensation." All other issues, legal and factual, are to be decided by the district court. 7 Moore, *Federal Practice* ¶71A.90[3]; compare 1 Nichols, *Eminent Domain* (3d ed.) p. 524.

The Sixth Circuit concluded that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation and, therefore, the jury's competence. To justify this conclusion it relied on two cases: *Miller, supra;* and *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329 (C.A. 4). The reasoning is insufficient to distinguish *Wardy;* if the interrelationship existed, it was present in that case as well as this one. And the cases relied upon do not carry the weight assigned to them. *Miller* arose long before the adoption of Rule 71A(h), and was governed by California procedure; nonetheless, the district court there excluded evidence of enhancement of value (317 U.S. at 372) and then, as a further precaution, instructed the jury to ignore any incremental value due to enhancement (*id.* at 373, 379). Thus, the *Miller* jury was not given the option of including or excluding enhancement depending on its view of the scope of the project, but was told by the judge that it could not consider such increments, as the jury here ought to have been instructed. *Roper* and a similar Fifth Circuit case, *Scott* v. *United States,* 146 F. 2d 131, were also decided before the

347-700—69——2

adoption of Rule 71A(h). Since that time, both the Fourth and Fifth Circuits have recognized that the jury's or commission's function must now be limited to the value question. *United States* v. *91.69 Acres in Oconee County,* 334 F. 2d 229, 231 (C.A. 4); *Wardy, supra.*

There are important reasons to exclude the scope-of-the-project question from jury consideration. One purpose of Rule 71A(h) is to assure that only those factors which are properly a part of valuation reach the jury or commission. Yet, if the jury must decide whether or not a particular taking came within the scope of the project, unless there is a bifurcated trial it will also receive the evidence of enhancement which a trial judge deciding the issue might exclude as irrelevant to valuation. This not only makes the jury's role considerably more complex, but raises the real possibility that through compromise, confusion, or inadvertence juries will enlarge condemnation awards in view of the enhancement values they have heard, even though they decide that the taking was within the scope of the project. Cf. *Jackson* v. *Denno,* 378 U.S. 368; *Bruton* v. *United States,* 391 U.S. 123. The law does not give the jury a choice whether a particular condemnee shall receive some enhancement because of the government project.[1] Yet that is the prac-

[1] As this Court has frequently noted, it is as important in condemnation cases to see that the public does not pay too much as that the owner does not receive too little. *E.g., United States* v. *Commodities Trading Corp.,* 339 U.S. 121, 123; *United States* v. *New River Collieries Co.,* 262 U.S. 341, 344; *Bauman* v. *Ross, supra,* 167 U.S. at 574–575.

tical effect of submitting the scope-of-the-project question to a jury, since that submission permits the landowner to put his evidence of enhancement value before them.

The adverse impact of the Sixth Circuit's ruling is likely to be substantial. Almost 1,500 tracts are now awaiting trial in the Sixth Circuit—not counting tracts condemned by the Tennessee Valley Authority, which have only recently been made subject to the Rule 71A procedures, P.L. 90–536, 82 Stat. 885 (Sept. 28, 1968); the national total is 12,600 tracts.

2. Should certiorari be granted in this case, we believe it will also be appropriate to re-examine the substantive meaning of the scope-of-the-project test as it has evolved from *Miller*. There has been substantial confusion about the meaning of that test among the circuits, which are often called upon to apply the test in fact situations similar to that presented here—condemnation to create public recreation areas or similar facilities on the shore of a federally constructed dam and reservoir. Thus, the Third Circuit has adopted the view that the *Miller* test is satisfied only if the particular lands in question are identified as likely to be taken at the time the government becomes committed to the project. *United States* v. *172.80 Acres of Land, etc.*, 350 F. 2d 957. In the Eighth Circuit, on the other hand, it is sufficient if at the time of commitment it is clear that some of the land around the reservoir pool will be taken for that use, even though the particular land is not identified. *United States* v. *First Pyramid Life Ins. Co.*, 382 F. 2d 804; *United States* v. *Crance*, 341 F. 2d 161, cer-

tiorari denied, 382 U.S. 815. In the proceedings below, the trial court's special interrrogatory and charge to the jury appears to have adopted the Third Circuit view; the court of appeals cited the Eighth Circuit cases and stated the *Miller* test accordingly, without reference to the particular lands taken.[2]

Of the two, the Eighth Circuit view is plainly closer to this Court's cases. In *Miller,* this Court pointed out that both there and in the earlier case of *Shoemaker* v. *United States,* 147 U.S. 282, the lands taken had not been particularly identified in the plans, although the plans did indicate that some such lands would be taken for that purpose. 317 U.S. at 377–379. But we believe it is appropriate to question whether the *Miller* distinction between "subsequent enlargement of the project" and lands which it was known would probably be condemned in connection with an original project, *id.* at 377, is entirely satisfactory, even when thus viewed. Today, the planning and execution of major public projects may take years; a test which ties the question of enhancement to the scope or uses originally planned—even in general terms—may significantly and unjustifiably increase the costs the public pays. Thus, a dam may initially be authorized to a certain height only—yet with full public awareness that additional height may later be added. If the increase is treated as a "subsequent enlargement," speculation will be rewarded, and the public purse injured. Cf. *Smither* v. *United States,* 117 Ct. Cls. 574,

[2] "If recreational areas were [within the scope of the project], then the landowner would not be entitled to any enhanced value due to the project" (App. A, *infra,* p. 17).

91 F. Supp. 582, certiorari denied, 340 U.S. 931. True, there may be cases where enjoyment of the enhanced value created by a project has begun, or investments have been made in reliance on what are represented to be or finally appear as fixed plans. Yet it is readily to be anticipated that during the planning and construction of federal projects, plans may be changed to require the purchase of more or different lands than were originally contemplated; at least before the project is substantially realized, the public should not have to pay for this flexibility by condemnation awards inflated to reflect expectations that the project would be constructed in a different way.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

GLEN E. TAYLOR,
Acting Assistant Attorney General.

RAYMOND N. ZAGONE,
ROBERT S. LYNCH,
Attorneys.

APRIL 1969.

APPENDIX A

Corrected by Order of January 24, 1969

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

Appeal from the United States District Court, Western District of Kentucky

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603–E, AND 603–E–2, W. G. REYNOLDS AND MARY N. REYNOLDS, DEFENDANTS-APPELLANTS

Decided December 9, 1968

Before O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges

CELEBREZZE, Circuit Judge. This appeal involves the valuation in a condemnation action instituted April 18, 1962 by the United States of America, hereinafter Appellee, against lands owned by W. G. Reynolds and Mary N. Reynolds, hereinafter the Appellants.

Appellants owned two tracts of land which were contained within the 811.92 acres condemned for the Nolin Reservoir Project in Edmonson and Hart Counties Kentucky. The property was designated Tract 203

and Tract 603, E and E–2. The latter Tract was taken in fee and easement.

The condemnation suit was tried before a jury which granted Appellants $20,000 as just and reasonable compensation for the taking of their land. It is Appellants' contention that misstatements contained within the Court's resume of the evidence greatly prejudiced the jury's decision that 78 acres within Tract 603 were within the scope of the project as defined in *Miller* v. *United States*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798.

In 1938 Congress authorized the construction of the Nolin Reservoir under the Flood Control Act. P.L. 761, 75th Congress. Funds were not appropriated for the planning of the project until July of 1956. Two years later on July 14, 1958, the Chief of Engineers approved a General Design Memorandum which contained all phases of construction and land acquisition. It was brought out through testimony that these memorandums generally contemplate the construction of appropriate recreational areas around reservoir sites. Neither this document nor any other design memorandum was entered into evidence.

Congress appropriated construction funds on October 12, 1958, but the project was not commenced until January of 1959.

Tract No. 603, the valuation of which is in dispute here, was purchased by Appellants in two separate transactions—one in October of 1959 and the other in January of 1960. The part of this Tract lying below the 566-foot level was to be inundated by the reservoir's water. No question is raised concerning its valuation, for it was admittedly within the scope of the project. The controversy revolves around the 78 acres contained within Tract 603 which was taken for public recreational purposes. This specific area was first designated in Design Memorandum No. 8, ap-

proved October 1, 1959. However, it was not contained within the memorandum as originally submitted on June 17, 1959. Appellants contend that its addition was merely an afterthought. The question the District Court placed before the jury was whether this property was probably within the scope of the project from the time the Government was committed to it and whether it was known that it probably would be condemned.

Prior to the swearing in of the jury the Court and the parties agreed that the rule set forth in *Miller* v. *United States,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, would govern any questions relating to enhanced value. It was at this time that Appellee placed Max Bohrer on the stand in an attempt to have the Court rule that nc evidence of enhancement could be placed before the jury. Mr. Bohrer had been an employee of the Corps of Engineers for twenty-four years and presently was Assistant Chief of the Real Estate Division, in the District Office. Appellants introduced three witnesses to refute the testimony of Max Bohrer.

The Court decided that it was faced with "a mixed question of law and fact * * * [which] * * * addresses itself to the Court to be determined before we go into the trial of the case." The Court then determined that under *Miller* v. *United States,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, the property was within the scope of the project from the beginning. Therefore the evidence of both parties would be limited to the value of the property without any enhancement. After a short recess, the jury was called and sworn to try the case. During the opening statements the Court called the attorneys to the bench and discussed its prior interpretation of the *Miller* case. At this point the Court reversed itself and decided that the mixed question of fact and law

concerning enhanced value should be submitted to the jury. The Court then permitted the attorneys to supplement their original statements to the jury.

Appellee takes issue with this interpretation of *Miller*. It does not believe the Court should have submitted to the jury the question of whether the 78 acres were within the scope of the project from the beginning of the Government's commitment to it. It would have this Court believe that under Rule 71A(h), Federal Rules of Civil Procedure, only a narrowly construed issue of just compensation may be submitted to the jury or commission. The Rule states that "* * * all other issues shall be tried by the court." Federal Rule of Civil Procedure 71A(h).

In *United States* v. *Certain Lands, etc.*, 144 F. Supp. 206 (1956) the court held that the issue of just compensation should not be interpreted as meaning that the jury's function is to be restricted solely to dollar amounts. The jury's province must be broad enough to weigh evidence which relates directly to the issue of just compensation. Courts have held that the question of whether or not a piece of property was within the scope of a project at a specific time is a proper one to be submitted to the jury. *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, *cf. John L. Roper Lumber Co.* v. *United States*, 150 F. 2d 329 (4th Cir. 1945). In *United States* v. *Crance*, 341 F. 2d 161 (8th Cir. 1965), it was only by agreement that the District Court, rather than the jury, was to decide whether the land was within the scope of the project as set forth in *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798. There only the monetary issue of just compensation was submitted to the jury.

In the case before this Court there was no such agreement. Therefore, the issue of just compensation

which was submitted to the jury properly contained the question relating to the scope of the project. The Court dealt with this question in its first interrogatory to the jury.[1] The Court specifically wanted the jury to decide whether or not a recreational area was within the scope of the project prior to its dealing with the monetary aspects. If recreational areas were so contemplated, then the landowner would not be entitled to any enhanced value due to the project. *United States* v. *Miller,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, *United States* v. *First Pyramid Life Insurance Company of America,* 382 F. 2d 804 (8th Cir. 1967), *United States* v. *Crance,* 341 F. 2d 161 (8th Cir. 1965). Since the jury decided that the 78 acre tract was within the scope of the project from the beginning, it did not include in its award any value due to enhancement. Unless there is other error present, this Court will not overturn the verdict of the jury based on substantial evidence. *Lavender* v. *Kurn,* 327 U.S. 646, 654 (1945), *Jayson* v. *United States,* 294 F. 2d 808 (5th Cir. 1961).*

---

[1] "Do you believe that the 78 acres of land which was later developed by the Government as a recreation area and ramp were probably within the scope of the project from the time the Government was committed to build the dam and it was a known fact that this 78 number of acres probably would be condemned? Answer 'Yes' or 'No'.

Yes X

No_____."

*After argument of counsel and submission to the Court, *Amen Wardy* v. *United States,* — F. 2d — (5th Cir. 1968) was called to this Court's attention. We do not adhere to the ruling in *Wardy,* supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

On appeal this Court is primarily concerned with the propriety of the trial Court's instructions. The question arises as to whether the Court invaded the province of the jury by referring to certain facts contained within the testimony of the Government's chief witness Max Bohrer, taken outside the presence of the jury.

Appellants contend that the Court's resume of Max Bohrer's testimony greatly prejudiced them in the eyes of the jury.[2] They point particularly to the section where the witness was to have said that: "it was all within the reasonable probability of being taken when they first started the project." It is Appellants' contention that Mr. Bohrer only stated that the residents should have known that the 78 acre parcel was going to be taken by the Government because it was adjacent to the land to be taken for the reservoir.

This Court is of the opinion that Appellants were prejudiced by the Court's summation of Mr. Bohrer's testimony. The record disclosed that in his testimony before the jury Mr. Bohrer stated that the Corps of Engineers' regulations which have been in effect since 1944 provided for the acquisition of recreational areas.[3] He stated that when a project is authorized

---

[2] In summarizing Max Bohrer's testimony the Court stated:

> "The United States offers the testimony of Mr. Bohrer, who says back in '58, '59, it was all taken, this was made into a ramp and into a recreation area. It was all taken at the same time and that *it was all within the reasonable probability of being taken when they first started on the development.*" (Emphasis added.)

[3] These regulations may be similar to those referred to in *Crance* v. *United States*, 341 F. 2d 161, 162 (8th Cir. 1965). The significant factor here was that the project contemplated recreational areas from its very inception. With reasonable certainty one could predict that land lying beyond the perimeter of the reservoir would have to be taken for recreational purposes. The Court reasoned that since the Crance property abut-

it is contemplated that it will include recreational areas. He went on to say that the general design memorandum normally planned for access points. However, Mr. Bohrer did not state that the Nolin Reservoir project, specifically, contemplated recreational areas, nor did he say that all of the property was within the reasonable probability of being taken when the Government started the project.

The record reveals that Max Bohrer and other witnesses were examined both in and outside the presence of the jury. It also discloses that part of the testimony referred to by the Court in its resume was taken outside the presence of the jury.[4] The part of the re-

---

ted the reservoir line and recreational areas had been contemplated, it was within the sphere of probable acquisition as defined in the *Miller* decision. *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798.

[4] The record reveals that there was a preliminary motion to be taken up prior to going into the trial. Appellee assured the Court that if allowed to put on its proof, it would show that the question of enhancement should be decided by the Court. The Court decided to allow the testimony, but excluded the jury from the courtroom. It was at this time that Max Bohrer was first called to the stand. Relevant questions and answers contained in his testimony are as follows:

"Q. Now, do the regulations of the Corps of Engineers make any provision for public use and access areas on these particular type projects?

"A. Well, in the General Design Memorandum, which was approved by the Chief of Engineers in Washington, on the 14th day of July 1958, the General Design Memorandum contemplated the acquisition of land and the construction of appropriate access facilities around the reservoir."

* * *

"Q. * * * My question is, did you have any knowledge, representing the Corps of Engineers, that the plans to acquire this recreational area known as Site 7 was disclosed to the public in any way or to the landowner, prior to the date of March 31st, 1961?

"A. Well, of course, because this land is adjacent to the reservoir, it is in the category of what I would call likely

sume being questioned by Appellants introduced new evidence to the jury.

The Court's summary of Mr. Bohrer's testimony related to the material question of whether the 78 acres were within the scope of the project from the time the Government became committed to it.[5] This Court is not trying to limit the trial Court's right to summarize the facts—especially in a complex situation as was here presented. *Minner* v. *United States,* 57 F. 2d 506 (10th Cir. 1932), *Rudd* v. *United States,* 173 F. 912, 914 (8th Cir. 1909). However, a judge should be very careful and exacting in exercising this function. He is not to assume the role of a witness, nor is he to introduce new evidence. *Quercia* v. *United States,* 289 U.S. 466 (1933), *Benes* v. *United States,* 276 F. 2d

---

to be taken for the project. As I said before, the planning goes on from the beginning to the end of this project and all land that is adjoining the reservoir or in the immediate vicinity thereof is susceptible to acquisition by the government until the project is completed."

COURT; * * *

"Q. Now, Mr. Bohrer, the question is whether the respondent landowners, that is the owners of this land in question, were probably within the scope of the project from the time the government was committed to it. * * *

"A. These lands were included within the scope of the project in our General Design Memorandum and—because part of the area we are talking about is required by flood control."

This testimony was made with specific reference to the 78 acre tract. It did not refer to vague or general Corps policies. The content is similar to the Court's resume which proceeded in a chronological order and dealt separately with each witness as he took the stand. The order in which the Court's resume deals with the witnesses is the same as they fall within the transcript of the proceeding. Where the Court has dealt with a witness twice, the witness has appeared both in and out of the jury's presence. It should be noted that the part of the resume which is questioned was the first of two references to Max Bohrer.

[5] See note 2.

99 (6th Cir. 1960). The jurors must be allowed to exercise their independent judgment upon the facts which are presented to them. The Court's inclusion of its review of evidential matters taken outside the presence of the jury in its comments to the jury represents reversible error.

The Court cautioned the jury that they were not to accept what he said as necessarily true nor were they to consider it as all of the evidence. He assured them that they were the ultimate triers of fact and that it was up to them to decide what the evidence was and what the inferences were to be drawn from it. Such an expression did not cure error in the charge pertaining to Mr. Bohrer's testimony. *Quercia* v. *United States,* 289 U.S. 466 (1932), *Nunley* v. *Pettway Oil Company,* 346 F. 2d 95 (6th Cir. 1965).

Appellants also claim error on several other grounds. They claim that the jury should have been instructed to bring in separate verdicts for each tract of land. No objection was raised concerning this particular point until after the jury had returned with a single verdict. The trial Court was not given the opportunity to correct itself, if error existed. It is the opinion of this Court that since Appellants enjoyed the benefit of the instruction as it stood, they are not now entitled to bring it up on appeal. *Welders Supply, Inc.* v. *American Employers' Insurance Company,* 358 F. 2d 593 (6th Cir. 1966).

Appellants also contend that the Court erred by not giving their requested instructions A, B, C, and D. This Court has held before in similar situations and so holds here that error will not result in such a refusal where the trial Court's instructions covered substantially the same thing. *Cobb* v. *Union Railway Co.,* 318 F. 2d 33 (6th Cir. 1963), cert. den. 375 U.S. 945, *U.S.*

Fidelity & Guaranty Co. v. *Canate,* 257 F. 2d 138 (6th Cir. 1958).

Lastly, the Appellants contend that they were prejudiced when the trial Court replaced one of the jurors with an alternate. The juror, R. S. Wingfield, had been seen talking with one of the witnesses. Although there was no actual showing of misconduct between the witness and the juror, the Court felt that the encounter raised a question of impropriety. We do not see how the Appellants were prejudiced by the Court's use of discretion. *Larson* v. *General Motors Corporation,* 148 F. 2d 319 (2d Cir. 1945), *cf. Jayson* v. *United States,* 294 F. 2d 808 (5th Cir. 1961). Alternate jurors were available and the Court felt there was sufficient reason to remove Wingfield to insure a just decision.

The judgment of the District Court is reversed and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

ORDER

UNITED STATES OF AMERICA, APPELLANT

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603-E AND 603-E-2, W. G. REYNOLDS AND MARY L. REYNOLDS, APPELLEES

Before O'SULLIVAN, CELEBREZZE AND COMBS, Circuit Judges

Upon due consideration, Appellant's petition for rehearing is denied.

It is further ordered that the following changes be made in the slip opinion filed December 9, 1968:

1. Strike out the word "repeatedly" in the seventh line of the first complete paragraph on page four; [1]

2. On page five at the end of the paragraph continued from page four insert an asterisk, i.e. * * * (5th Cir. 1961).*;

3. At the bottom of page five add the following footnote which will be designated by an asterisk:

*After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, —F.2d — (5th Cir. 1968) was

[1 The text at p. 16, l. 21, *supra*, originally read "Courts have repeatedly held * * *."]

called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, W. G. REYNOLDS AND MARY N. REYNOLDS, DEFENDANTS-APPELLANTS

Before O'SULLIVAN, CELEBREZZE AND COMBS, Circuit Judges

JUDGMENT

Appeal from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings consistent with the opinion.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1969